NO. 84-495

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD THORNBURGH, et al.,

Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION, et al.,

Appellees

On Appeal From The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I. THE POLICIES UNDERLYING 28 U.S.C. §1254(2) SUPPORT THE CONCLUSION THAT THE STATUTE IS NOT LIMITED TO FINAL JUDGMENTS.

In resisting our argument that this case properly was appealed to this Court under 28 U.S.C. §1254(2), appellees rely upon the general rule favoring finality as a prerequisite to appellate jurisdiction and the rule's foundation - the policy of avoiding piecemeal review. In our main brief we have shown, in an argument not refuted by appellees, that certain overriding policies have, on occasion, moved Congress to permit interlocutory appeals despite the recognition that the result could be piecemeal review. It is the overriding policy of providing an avenue for mandatory, expeditious review by this Court which informs resolution of the jurisdictional issue here.

Appellants seem to argue (Appellees' Br. 8-9), relying upon McLish v. Roff, 141 U.S. 661 (1891), that the absence of an express finality requirement in Section 1254(2) mandates a conclusion that finality is required. To be sure, McLish held that finality was required for appellate jurisdiction even though the statute under examination there contained no express finality language.[1] But the Court in that case found no identifiable policy which contradicted the general rule of

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[1] McLish construed a provision granting direct appellate review in the Supreme Court in cases involving jurisdictional questions. Section 5 of Act of March 3, 1891, 26 Stat. 826, 827.

finality. By contrast, the history and purpose of Section 1254(2) demonstrate the importance of according it a broad reach and in not applying the general rule of finality.[2]

In the early 1920's the Court submitted to Congress draft legislation for altering the Court's jurisdiction. That proposal became the centerpiece for the Judiciary Act of 1925, 43 Stat. 936. The main purpose of the Court's proposal was to restrict severely the

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[2]We certainly do not dispute appellees' point that Congress is presumed to be aware of this Court's decisions. It stretches this principle beyond its breaking point to suggest, however, that the presumed knowledge of McLish requires the conclusion that finality is required in every case in which there is no mention of the requirement. This would render as surplusage Congress' repeated use of explicit finality language.

Court's obligatory appellate jurisdiction. Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 310-311 (1978); F. Frankfurter and J. Landis, The Business of the Supreme Court, 260-261 (1928). But although Congress accepted the Court's central thesis of restricting obligatory review, it insisted upon an important amendment to the Court's plan - the creation of mandatory appellate jurisdiction over cases in which a court of appeals has decided against a state statute on constitutional grounds. Section 240(b), 43 Stat. 938. Thus, the Judiciary Act of 1925, while generally restricting the Court's mandatory jurisdiction, reflected Congressional recognition of the

"important issues of federalism which arise. . . when a federal court strikes down a state law." Simpson, supra, at 313.[3]

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[3]Appellees place far too much reliance (Appellees' Br. 9-10) on the comments by several Senators that former Section 240(b) was intended to be on "parity" with former Section 237(a) (now 28 U.S.C. §1257) which gave the Court mandatory jurisdiction over final judgments of state courts holding federal laws unconstitutional or rejecting constitutional challenges to state laws. As Frankfurter and Landis point out, parity between these provisions was not achieved in a number of respects. Frankfurter and Landis, supra, at 286 n.118. Moreover, it must be remembered that, pursuant to the Judiciary Act of 1925, the Court had no jurisdiction to review any non-final state court decisions. Section 237, 43 Stat. 937-938. By that same Act, Congress did, however, give the Court jurisdiction to hear by appeal or certiorari a wide variety of interlocutory questions coming from federal courts. Sections 238, 239, 240, 43 Stat. 938-939. Considerations of finality are far more important under Section 1257 because

FOOTNOTE CONTINUED

The Congress' strong concerns for federalism distinguish the provision under review here from the statute examined in McLish.[4] It may be that the omission of an explicit finality requirement, standing alone, permits a conclusion that finality is required.

FOOTNOTE CONTINUED FROM PREVIOUS PAGE

of the strong policy of "minim[izing] federal intrusion in state affairs." North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 159 (1973); see also Republic Gas Co. v. Oklahoma, 334 U.S. 62, 67 (1948).

[4]Even where finality is expressly required for there to be appellate jurisdiction, the Court has not "administered" that requirement in a "mechanical fashion." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975). In the present case, many of the same considerations which support the view that finality is not required also would justify a flexible construction of the finality requirement which

FOOTNOTE CONTINUED

But when the substantive policies underlying the jurisdictional provision support interlocutory review, those policies together with the absence of a finality provision compel the conclusion that interlocutory appeal is permitted.[5]

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permits an appeal from a decision of a court of appeals striking down some provisions of state law and remanding for further proceedings on other related statutory provisions.

[5]Repeal of the three-judge court provisions, 90 Stat. 1119, is consistent with an expansive construction of Section 1254(2). Repeal of those statutes was designed primarily to relieve the lower federal courts from the burdens imposed when three judges, one of which was a circuit judge, were required to hear a case and to remove the uncertainties of three-judge court practice. S. Rep. No. 94-204, 3-4

FOOTNOTE CONTINUED

Recently, the Court applied similar principles in holding that a decision granting a preliminary injunction against enforcement of an act of Congress was appealable under 28 U.S.C. §1252. Walters v. National Association of Radiation Survivors, No. 84-571 (June 28, 1985). As initially enacted, Section 1252, like the original version of Section 1254(2), 43 Stat. 939, permitted an appeal if the decision was "against" the statute. The Court in Walters held that a preliminary assessment of the merits certainly was

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(1975). In endorsing repeal of these provisions, Congress evidently was confident that an appeal to this Court after review by a court of appeals would safeguard adequately the interests of federalism. See S. Rep. 94-204, supra, at 10.

"against" the validity of the statute. Slip op, at 12. As the Court noted, Section 1252 is an exception to the general policy of minimizing the Court's obligatory jurisdiction. The policies identified by Congress in passing Section 1252 are frustrated "by an interlocutory decision . . . in the short run just as surely as a final decision to that effect." Walters, slip op, at 13. Although Section 1254(2) is less explicit than Section 1252 in providing for non-final review, the analysis in Walters is supportive of a generous construction of Section 1254(2).[6]

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[6]The Court has construed Section 1254(2) narrowly in the sense that the decision under review must expressly strike down a state statute. Silkwood

FOOTNOTE CONTINUED

For these reasons and those set forth in our main brief, the Court should accept jurisidication over this appeal.

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v. Kerr-McGee Corp., 464 U.S. 238, 246-247 (1984); Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 42-43 (1983); Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n.1 (1970). But unlike Silkwood, Perry and Fornaris, this case concerns an express decision striking down state statutes. Although it certainly is understandable that the Court has chosen to limit the statute strictly to those types of cases important enough to warrant obligatory review, it would subvert the purpose of the appeal statute to deny an appeal from a decision precisely within the evil addressed by Congress.

II. AT THIS STAGE OF THE PROCEEDINGS THE COURT MAY UPHOLD THE STATE STATUTES BEFORE THE COURT, BUT IT MAY NOT AFFIRM THE COURT OF APPEALS' DECISION STRIKING DOWN THE STATUTES.

In our main brief we discussed at length the authority and rationale which supports our position that, given the procedural posture of the case and the record created below, the statutes may be upheld, but not finally declared unconstitutional.

In opposing our argument that the statutes may not be stricken at this stage of the proceedings, appellees say only that "no set of facts could alter the result." Appellees' Br. 14.[7] One would expect appellees to take this

[7]Appellees do not dispute our contention that, from their standpoint, the record is complete for purposes of a ruling on the statutes before the Court.

position and also to denigrate the short explanation in our main brief of some of the evidence we will present at trial if the statutes are not upheld. But no rule of law supports an appellate court's right to conclude in the first instance, contrary to a party's wishes, that a trial would serve no purpose. Elementary considerations of fairness dictate a result contrary to the position taken by appellees.

III. THE STATUTES BEFORE THE COURT ARE CONSTITUTIONAL.

A. The Reporting Requirements Serve Important Health Objectives And Properly Respect Confidentiality

Appellees attack the reporting requirements of 18 Pa. Cons. Stat. Ann. §3214 (Purdon 1983) on two tacks - first, they argue that these provisions do not respond to "important health-related concerns"; and, secondly, they claim that the provisions do not adequately protect the confidentiality of patients and physicians. Appellees' Br. 40-41. Neither contention withstands analysis.

1. The health basis for the reporting requirements is obvious - if abortion is to be studied and made safer, there must be data upon which to base future studies. Appellees acknowledge this obvious point, but stress instead that some of the information

requested by Pennsylvania is not required on reports made to the Centers for Disease Control. Appellees' Br. 40-41 n.39.

The differences between Pennsylvania's report and the information gathered by the CDC is based largely on Pennsylvania's use of this report to aid with enforcement of the statutory provisions. See 18 Pa. Cons. Stat. Ann. §3214(a)(8)-(11), (13). It hardly can be argued that, with this factor taken into consideration, the reports depart from appropriate medical purposes.[8] Moreover, information on

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[8]In fact, amici American Medical Association and other associations of medical professionals do not challenge the reporting provisions, except to the extent that physicians must report the basis for certain medical judgments. Brief of American Medical Association, et al., at 46-47.

the basis for physicians' judgments on viability and choice of abortion method provide the research community with difficult to find information on late-term abortions. See Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 263-265 (1984).

2. Appellees' other contention (Appellees' Br. 41-43) seems to be that confidentiality is not assured thereby risking violence to patients and physicians. But the statute explicitly mandates confidentiality both for patients and physicians. 18 Pa. Cons. Stat. Ann. §3214(a), (e) (Purdon 1983). The reports may not identify the patient, nor may the reports released to the public "lead to the disclosure of any

person filing a report." Section 3214(e)(2). Unauthorized disclosure carries criminal penalties. Section 3214(e)(4).

Appellees' specific protestations are rather far-fetched. Appellees' Br. 42 n.41. If the abortion facility is a doctor's office, facility information will be deleted from the public reports since that information would "lead to the disclosure" of the person filing the report. Appellees' hypothesis regarding the ability of someone to piece together fragmentary bits of personal information and so to identify the patient is without credence. It is difficult to believe that anyone, even the most zealous opponent of abortion, would go to the extreme efforts described by appellees. This possibility is particularly remote when it is remembered that abortion

clinics are visable establishments which provide more than sufficient opportunities for "sidewalk counselors" to address abortion patients without the need for extraordinary detective work.[9]

B. The State Is Permitted To Insure That Women Are Provided With Relevant Information Before They Decide Whether To Have An Abortion.

In our initial brief we outlined in detail the bases, both legal and logical, for each category of information described in 18 Pa. Cons. Stat. Ann. §3205(a) (Purdon 1983).

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[9]In a rather confusing discussion, appellees claim that the requirement for filing of maternal death reports (18 Pa. Cons. Stat. Ann. §3214(g) (Purdon 1983)) was enjoined by the Court of Appeals, but is "nevertheless objectionable." Appellees' Br. 37 n.36. Not only was this provision not enjoined, the Court of Appeals noted that it was unchallenged in that court. J.S. App. 82.

Appellees, rather than contesting these points, have chosen instead to argue that the provisions are impermissably coercive and that the state may not in any case specify the types of information which must be provided to patients if their consent to a surgical procedure is to be truly informed.[10] Appellees' Br. 12-23. Neither of these arguments stand up to close scrutiny.

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[10]Amici American Civil Liberties Union, et al. argue against the requirement that women be informed that some risks of abortion are not "accurately forseeable," 18 Pa. Cons. Stat. Ann. §3205(a)(iii) (Purdon 1983) because, they say, no risks are unforseeable. Br. 18. This point is refuted by amici Planned Parenthood Federation of America, et al., who point out that "medical evidence is quite inconclusive" on some of the risks of abortion. Br. 7.

1. In arguing that the information described in Pennsylvania's statute is designed to discourage women from obtaining abortions appellees overlook the crucial purpose of informed consent requirements - patients are entitled to information which may affect their decision whether to submit to a medical procedure. If the required information would not have an effect - namely, encouraging some and discouraging others to follow through with treatment - then this process would be meaningl s.

Un e the ordinance which the Court examine City of Akron v. Akron Center For R roductive Health, Inc., 462 U.S. 416 (1983), the Pennsylvania statute steers clear of "dubious statements" and an obvious "parade of horribles." Id., at 444-445. To be

sure, contemplation of an abortion may be stressful and that concern may be heightened by a discussion of potential consequences from the procedure. The same can be said about any medical procedure. But the stress which we all feel when medical treatment is contemplated and the accompanying difficulty in carefully examining the available options underscores the need for a requirement that relevant information be provided to the patient. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976). Viewed in this way, appellees' objections to the statute melt away.

A scientifically accurate description of fetal characteristics may cause anxiety, but if the woman chooses to review this optional material there is no justification for withholding it.

The agencies listed in the optional materials might include some whose philosophy does not coincide with that held by clinic employees, but it is for the woman, not the clinic personnel, to decide where she will seek help. The suggestions that medical assistance benefits and support payments may be available, if presented properly as the statute plainly permits, should serve only better to inform the woman's decision.

Appellees' opposition to the medical information requirements shows little faith in women and in the professional personnel at abortion facilities. We are confident that physicians and counsellors can present information regarding the known medical risks of abortion and the possibility of unforseeable risks in a manner which

helps their patients to make a truly informed decision.[11] Appellees' concern with the potential for confusion is no more than unsupported speculation that professionals cannot present relevant, somewhat technical information in a manner understandable to the layman. This argument falls of its own weight.

2. Appellees apparently do not oppose entirely the idea of informed consent, but they argue that any state structuring of this interchange - however general and open-ended the requirements may be - violates the rule which requires that professionals be

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[11]While appellees may be correct that the statute requires the disclosure of all risks (appellees' Br. 23), the statute permits the physician or counsellor to place this information in its proper perspective.

given flexibility in conducting the informed consent dialogue. See City of Akron, 462 U.S., at 445. But whatever may be the wisdom in other contexts of permitting physicians and counsellors a completely free hand in deciding what to discuss with patients, the abortion situation presents a compelling case for some general requirements.

The Pennsylvania Legislature found that many women are encouraged to obtain abortions without being provided with complete information. 18 Pa. Cons. Stat. Ann. §3202(b)(1). The record in this case reflects that women are not always provided with information relevant to the abortion decision - information which, had it been provided as required by the statute, would have altered their decision to have an abortion. J. App. 44a. The failures of

abortion facilities and referral agencies to balance the information provided to pregnant women has been well-chronicaled. See The Abortion Profiteers, Chicago Sun-Times 2-3, 20-22 (Special Reprint 1978).

We agree that the statute provides "strong incentives for compliance," but it is unreasonable for appellees to suggest that they will be forced to give women information "that tracks the statutory language precisely, without elaboration." Appellees' Br. 23. If the physician or counsellor complies with the general provisions of the statute, he or she is free to explain the significance of this information in any way which is appropriate.

Pennsylvania has responded to the very real problem created by the refusal of some abortion providers to present necessary information to women considering abortion. Pennsylvania's response is general enough to permit appropriate counseling and specific enough to serve the permissible purpose of insuring that women are apprised of the nature and consequences of their choice, and the alternatives available to them. The statute strikes the appropriate balance and should be upheld.

C. There Is Still A Live Controversy Concerning The Parental Consent/Judicial Approval Provisions And The Rules Governing Judicial Proceedings Are Valid.

The Court of Appeals upheld the statutory provisions governing parental consent or judicial approval for minors' abortions, 18 Pa. Cons. Stat. Ann. §3206 (Purdon 1983), but ordered the statute

enjoined anyway because the state Supreme Court had not issued rules for judicial approval proceedings. J.S. App. 50a-52a, 56a. In our main brief we argued first that no implementing rules were required, and second, that the rules issued after the Court of Appeals' decision satisfy that court's concerns. Appellees do not mention our first point. Instead they argue that this issue is moot and that, in any event, the rules are insufficient to allay constitutional concerns.

1. The controversy between the parties concerns the constitutionality of 18 Pa. Cons. Stat. Ann. §3206 (Purdon 1983). Appellants continue to defend this provision and appellees have not conceded its validity. Plainly, the new rules did not terminate this controversy. A question is moot only if (1) there is no likelihood that "the

alleged violation will recur and (2) interim relief or events have completely and irrevocably erradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (citations omitted). Under this test, the claim against Section 3206 is not moot.

In fact, it is somewhat ironic that appellees argue mootness for they hardly contend that interim events - the issuance of new state procedural rules - "erradicated the effects of the alleged violation." Rather, appellees have confused the concept of mootness, a jurisdictional rule grounded in the Article III case or controversy requirement,[12] with the Court's prudential

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[12] See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-603 (1982); United States Parole Commission v. Geraghty, 445 U.S. 388, 395-397 (1980).

decisions whether to address a pending claim in light of recent developments.

Appellees refer to several cases in which the Court has declined to address claims which have been affected by intervening changes in the law. Appellees' Br. 44. In many other cases, the Court has considered the claim before it in light of statutory or regulatory changes made after the decision under review. See California Bankers Association v. Schultz, 416 U.S. 21, 49-50 n.21 (1974); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281-282 (1969); Carpenter v. Wabash Railway Co., 309 U.S. 23, 26-27 (1940); American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 201 (1921); Crozier v. Krupp, 224 U.S. 290, 302-306 (1912); Dinsmore

v. Southern Express Co., 183 U.S. 115, 120-121 (1901). Although appellees seem to suggest that a remand is necessary to permit development of a factual record (Appellees' Br. 44), their arguments and the order below are based solely on the law. They suggest no facts which support additional arguments which they now wish to make. Thus, this claim may be rejected and the lower court order reversed.

2. In the Court of Appeals, appellees argued that Section 3206 must be enjoined because there were no rules guranteeing confidentiality, preventing delay, describing the petition process or outlining the evidence a court was to consider. See Supplemental Brief for Appellants in the Court of Appeals, 20-22. The Court of Appeals held that regulations were necessary to ensure

confidential, expedited proceedings; to establish a simple procedure for court approval; and to require court personnel to assist the minor. J.S. App. 54a. In light of the new rules, appellees still complain about delay, but they have shifted the main focus of their argument to complaints regarding parental involvement, appointment of counsel and the appropriate role for guardians ad litem. Appellees' Br. 46-48.

As to the delay claim, we have addressed that issue fully in our main brief. Appellants' Br. 80-81. Moreover, the Court may reject the remaining claims without requiring the District Court to first to pass on them.

Appellees mischaracterize the rules as giving a minor's parents "an absolute right to attend the hearing." Appellees Br. 46. In fact, the rules provide only that parents are among

those who are not absolutely excluded from attendance in all cases. See Orphan's Court Rule 16.4, Addendum 51a. In Bellotti v. Baird, 443 U.S. 622, 642 (1979), a plurality of the Court approved of limited parental involvement in judicial authorization proceedings.[13] In the case of an immature minor, a court may conclude that the minor's best interests would be served by "parental consultation in which the court may participate." Ibid. Neither Pennsylvania's statute nor its rules provide for parental notification and we safely may assume that, in conducting hearings,

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[13]In later cases, the Court has followed the plurality opinion in Bellotti. See City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 439-441 (1983); Planned Parenthood Assoc. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 490-493 (1983) (Opinion of Powell, J.).

the state courts will adhere to the limits on parental involvement announced by this Court.

Appellees' arguments regarding appointment of counsel and guardians ad litem are contradictory. They argue that the rules are deficient for not requiring counsel in every case and in permitting participation of a guardian in all cases. It is inconceivable that Pennsylvania's Orphans' Courts and the Family Court in Philadelphia, experienced as they are in dealing with the legal problems of minors, will be unable properly to determine, in conjunction with the minor, her need for counsel and the proper role for her guardian. This Court has provided the state courts with

ample direction in how to deal with minors seeking abortions. Pennsylvania's rules are consistent with the Court's directives and, together with the statute, provide a constitutional procedure for parental consent or judicial approval.

D. The Provisions Of Pennsylvania Law Regulating The Choice Of Abortion Method And Standard Of Care For Post-Viability Abortions Are Constitutional.

Pennsylvania's statute offers limited protection to the viable fetus - the abortion method least risky to the fetus must be used unless it would be significantly riskier to the mother than another available method; and, the physician is to treat the aborted fetus with the care he would extend to any

other person in like circumstances. 18 Pa. Cons. Stat. Ann. §3210(b) (Purdon 1983). Appellees' primary challenge to this statute (and the one accepted by the Court of Appeals) is that the use of the term "significantly" in the statute requires that the woman bear some additional risk. We have dealt with this question in our main brief and will not repeat that analysis here. Appellees' other challenges to this provision deserve only brief comment.

1. Appellees claim that the choice of method requirement is void for vagueness because it requires physicians to make "uncertain judgment calls." Appellees' Br. 28. What appellees fail to appreciate is that the statute requires no more of the physician than that he exercise his best medical judgment in determining viability and

selecting the appropriate abortion method. See 18 Pa. Cons. Stat. Ann. §§3203 ("viability"), 3210(a) and (b). The Pennsylvania Legislature certainly appreciated the fact that the practice of medicine is as much an art as it is a science. So long as physicians exercise their good-faith judgment in determining viability and assessing the risks of particular abortion methods they will comply with the statute.[14] The state permissably "may choose to provide safeguards for the comparatively few instances [in which] live birth [may] occur." Ashcroft, 462 U.S., at 486. This includes a requirement that the

[14]Amici American Medical Association, et al. point out that physicians are aware of the relative riskiness of late-term abortions and the health contraindications for the various common methods. See A.M.A. Br. 35-38.

medical judgment of the physician be exercised with the viable fetus, as well as the woman, in mind. See ACOG Statement of Policy, "Further Ethical Considerations In Induced Abortion" (December, 1977), p.4 ("inducing abortion in no way implies that the physician has an adversary relationship towards the fetus . . . the physician does not view the destruction of the fetus as the primary purpose of abortion").

2. Section 3210(b) requires the physician performing an abortion on a viable fetus to provide the fetus with the degree of care given to a fetus when the intention is to produce a live birth. Appellees claim that this provision is unconstitutionally vague because it does not "specify particular

actions that a physician must take in order to meet the standard of care." Appellees' Br. 33. Again the statute leaves the physician with the room necessary to exercise his best medical judgment. Presumably, if the statute was as specific as appellees suggest, they would argue that it leaves physicians with too little room to exercise their best medical judgment.

Appellees also reiterate the argument, made in opposition to the second-physician requirement, that the absence of a clear maternal life or health exception condemns the standard of care requirement. Appellees' Br. 33-34. Without repeating at length the argument which we have made earlier (Appellants' Br. 56-58), it is sufficient to note that Section 3210 includes

an exception to all of its requirements if measures dangerous to the fetus are "necessary to preserve material life or health." 18 Pa. Cons. Stat. Ann. §3210(a) (Purdon 1983).

CONCLUSION

For these reasons and those set forth in our initial brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Date: October 7, 1985